Supreme Court, U.S.
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NO. 01-1229

IN THE
SUPREME COURT OF THE UNITED STATES

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, AS LEGAL GUARDIAN FOR JENNIFER GUILLEN AND ALMA GUILLEN, MINORS; AND MARIANO GUILLEN, AS LEGAL GUARDIAN FOR PAULINA GUILLEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

AMICUS BRIEF OF THE STATES OF ALASKA, FLORIDA, HAWAII, INDIANA, OHIO, OREGON, NEBRASKA, NEVADA, VERMONT, WASHINGTON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

CHRISTINE O. GREGOIRE
Attorney General
WILLIAM BERGGREN COLLINS*
MICHAEL E. TARDIF
Sr. Assistant Attorneys General
1125 Washington Street SE
P.O. Box 40126
Olympia, WA 98504-0126
(360) 459-6600
**Counsel of Record for Amicus Curiae*
Additional Counsel Listed inside

15?

Bruce M. Botelho
Attorney General of Alaska
123 4th Street
PO Box 110300
Juneau, Alaska 99811

Robert A. Butterworth
Attorney General of Florida
The Capitol PL-01
Tallahassee, Florida 32399-1050

Earl I. Anzai
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Steve Carter
Attorney General of Indiana
Government Center 4th Floor
402 W Washington Street
Indianapolis, Indiana 46204

Don Stenberg
Attorney General of Nebraska
Department of Justice
PO Box 98920
Lincoln, Nebraska 68509

Frankie Sue Del Papa
Attorney General of Nevada
100 N Carson Street
Carson City, Nevada 89701

Betty D. Montgomery
Attorney General of Ohio
30 East Broad Street
Columbus, Ohio 43266

Hardy Myers
Attorney General of Oregon
1162 Court Street NE
Salem, Oregon 97310

William H. Sorrell
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609-1001

Darrell V. McGraw, Jr.
Attorney General of West Virginia
State Capitol Room 26-E
1900 Kanawha Boulevard E
Charleston, West Virginia 25305

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INTEREST OF AMICI

This brief is being filed under Rule 37(4), permitting amicus curiae briefs by states without the need for consent of the parties or leave of the Court.

Washington and the other amici states all operate extensive highway facilities and receive substantial federal funding to make safety improvements to these facilities. *See* 23 U.S.C. § 152. Federal law requires amici to compile and maintain extensive records of vehicle accidents and other data to support their applications for federal funding. 23 U.S.C. §§ 402(a), 152. Federal law also protects amici from use of these federally-required data collections as evidence that a highway was defective and that the state had notice of the defect. 23 U.S.C. § 409.

The decision of the Washington State Supreme Court declares part of 23 U.S.C. § 409 unconstitutional, removing liability protection afforded to states who participate fully in an essential federal safety program. The states have a strong interest in supporting a federal statute that protects their ability to participate in a federal program which serves important state and federal interests.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve a conflict that involves a vital federal-state program to increase highway safety.

1. The Federal Aid Highway Act Created A Successful Program To Provide Funding To States For Safety-Related Capital Improvements To Older Highways

All states receive substantial funding from the United States under the Federal Aid Highway Act (the Act or the Highway Act), 23 U.S.C. § 101, *et seq*. States assent "to the

purposes, provisions, terms, and conditions of the grant of money provided" by legislation and by accepting and expending federal funds provided under the Act. *See* Wash. Rev. Code §§ 47.04.050-.070. The large size and importance of this program is shown by the size of the appropriations. For the 1999-2001 biennium, Washington State alone anticipated receiving almost $700 million in federal funding, approximately 45 percent of its entire highway budget. 2000 Wash. Laws ch. 217, 219, 221, 222, 223, 226, 232.

The Highway Act also provides specific funding for safety improvements to older highways. The Act contains a broad "hazard" elimination program which provides funding for states to improve "hazardous locations, sections, and elements" that might be a "danger to motorists, bicyclists, and pedestrians". 23 U.S.C. § 152. The Act also contains sections providing funding for improvements to unsafe bridges and hazardous railway-highway crossings. 23 U.S.C. §§ 130, 144. The federal-state partnership in the highway safety program has produced substantial injury and accident reductions in locations where capital improvements have been funded. The 1996 Report of the Secretary of Transportation to Congress summarized the reductions as follows:

> **"Effectiveness of the Rail-Highway Crossings Program**
>
> "The **Rail-Highway Crossings** Program continues to show the greatest percentage of accident rate reductions. Fatal, nonfatal-injury, and combined fatal-plus-nonfatal-injury accident rates have been reduced by 87, 64, and 68 percent, respectively. . . . Based on evaluations of improvements provided by the states, the **Rail-Highway Crossings** Program has helped to prevent more than 8,500 fatalities and 38,900 nonfatal injuries since 1974.

> **"Effectiveness of the Hazard Elimination program**
>
> "The Hazard Elimination Program has provided substantial reductions in accident rates, particularly fatal accidents. Fatal, nonfatal-injury, and combined fatal-plus-nonfatal-injury accident rates have been reduced by 51, 27, and 27 percent, respectively. . . . Evaluations of improvements made under the **Hazard Elimination** Program indicate that the program has helped to prevent more than 26,500 deaths and 760,000 nonfatal injuries since 1974."[1]

A major part of the hazard elimination program has consisted of improving, installing, and upgrading traffic signals.[2]

2. The Funding And Prioritization Of The Federal Aid Improvement Projects Require The State To Collect A Large Amount Of Safety Data With Concomitant Potential For Tort Litigation Against The States

The safety improvement provisions of the Highway Act require state governments to perform engineering surveys and compile extensive data to support requests for funding. 23 U.S.C. §§ 152(a), 144(b), 130(d). A prominent part of the data that is used to analyze and prioritize safety improvement projects is records of vehicle accidents. The implementing regulations for the safety improvement program specifically require a state process for collecting, maintaining, and analyzing accident data for "hazardous" locations, sections, and elements. Section 924.9 of Title 23 of the Code of Federal Regulations provides, in part:

> "(a) The planning component of the highway safety improvement program shall incorporate:

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[1] U.S. Dep't of Transp., Fed. Highway Admin., *1996 Annual Report on Highway Safety Improvement Programs, Pub. No. FHWA-SA-96-040*, at IV-5 (Apr. 1996). This was the last annual report.

[2] *Id.* at IV-3.

"(1) A process for collecting and maintaining a record of accident, traffic, and highway data, including, for railroad-highway grade crossings, the characteristics of both highway and train traffic;

"(2) A process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of accident experience or accident potential[.]" 23 C.F.R. § 924.9.

Moreover, the Secretary of Transportation is required to make grants to states to establish and maintain "comprehensive computerized safety record keeping system[s] designed to correlate data regarding traffic accidents, drivers, motor vehicles, and roadways". 23 U.S.C. § 402(k).

The engineering studies and compilations of data regarding highway "safety" and "hazards" likely will expand the bases for tort liability for the states. Traditional tort liability for highways lies in the area of signing and maintenance. Under state tort law, highway authorities can be liable if they do not properly apply the uniform signing manual or fail to repair a broken highway element after notice of the defect. *See Kitt v. Yakima County*, 611 P.2d 1234 (Wash. 1980); *Bird v. Walton*, 848 P.2d 1298 (Wash. App. 1993). There can also be liability for improper design of new facilities, although some states and courts limit the liability because design is discretionary or governmental. *See Stewart v. Washington*, 597 P.2d 101 (Wash. 1979) (liability for lack of lighting on new bridge); Cal. Gov't Code § 830.6 (immunity for design). Thus, traditional highway tort liability arises largely from alleged failures to conform to established engineering standards (signing and design) or to repair existing highway features which have fallen into disrepair (maintenance).

The data compilation and engineering analyses required by the federal safety improvement program foster a new kind of tort litigation against highway authorities. In these cases, the claim is generally not that the highway was improperly designed, signed, or maintained. The claim is that the engineering analyses and compilation of accident and other data establish that the highway was unsafe and hazardous, and that the highway authority had notice of this "defect" and failed to make capital improvements to "repair" it. The Guillen lawsuit is typical of these lawsuits. The complaint concerns an intersection controlled by stop signs rather than modern traffic signals. The evidence which plaintiffs seek from Pierce County to support liability are the accident reports that were collected and the engineering studies that were written by the county to support its application for funds under § 152 to make capital improvements to the intersection by adding traffic signals.

The safety data collected by highway authorities in an effort to obtain safety improvement funding from the federal highway program provides the basis for claims that state highway authorities have tort liability for not making the capital improvements sooner. Elimination of the protection provided by 23 U.S.C. § 409 inhibits full state participation in the Highway Act program and interferes with both state and federal interests of improving highway safety.

3. Federal Law Facilitates The Record Keeping And State Participation Needed To Sustain The Federal Safety Program By Protecting States From The Use Of Federal Safety Data In Tort Litigation

Federal law provides the data compiled pursuant to the Highway Act, 23 U.S.C. § 409 is not subject to discovery or admission into evidence in state or federal court proceedings or actions for damages occurring at locations mentioned or addressed by the data. The purpose of the statute is to facilitate candor in the administration of the

safety improvement program by preventing the use of data developed for the federal safety program as a tool in private litigation. *Harrison v. Burlington Northern R.R. Co.*, 965 F.2d 155 (7th Cir. 1992).

Section 409 protects the states from having litigation by private parties deter states from collecting and compiling the accident reports and other highway safety data which the federal hazard elimination program requires to evaluate and prioritize the highway safety improvement projects competing for funding. *See Palacios v. Louisiana & Delta R.R. Inc.*, 740 So. 2d 95, 98 n.6 (La. 1995). Ultimately, § 409 protects the federal government from the uncertain impact of state tort liability which would discourage the record keeping and state participation needed to sustain the federal safety improvement program.

4. The Washington State Supreme Court Decision Substantially Interferes With State And Federal Interests In Highway Safety And Should Be Reversed

The intervention of this Court is necessary to resolve the conflict between *Guillen* and other courts that have considered the issue. All of the courts which have considered the constitutionality of 23 U.S.C. § 409 have upheld its constitutionality.[3] Several courts have also determined that § 409 pre-empts state law under the Supremacy Clause.[4] However, many states have not

[3] *Claspill v. Missouri Pac. R.R. Co.*, 793 S.W.2d 139 (Mo. en banc 1990); *Martinolich v. Southern Pac. Transp. Co.*, 532 So. 2d 435 (La. App. 1988); *Southern Pac. Transp. Co. v. Yarnell*, 863 P.2d 271 (Ariz. 1993).

[4] *City of Atlanta v. Watson*, 475 S.E.2d 896 (Ga. 1996); *Dep't of Transp. v. Solano County Superior Ct.*, 47 Cal. App. 4th 852, 55 Cal. Rptr. 2d 2 (1996); *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So. 2d 170 (La. 1993); *Sawyer v. Illinois Cent. Gulf R.R. Co.*, 606 So. 2d 1069 (Miss. 1992).

addressed this issue and there are no federal appellate decisions on the subject.

The volume of reported decisions nationwide concerning the § 409 privilege, during the relatively brief period since its original enactment in 1987, provides an indication of the importance of the protections of the statute. There are already well over 100 reported decisions in state and federal courts in 25 different jurisdictions. This is essentially a statute creating an evidentiary privilege. A statute governing evidence would not usually produce a large volume of appellate decisions in a short time period. Section 409 has produced a large number of appellate decisions because the highway safety data created to implement the Federal Highway Act has spawned a kind of tort litigation against states that is enabled almost solely by this data. Such litigation is difficult to sustain without the data collected to implement the federal highway safety program.

The importance of § 409 to the federal scheme is also indicated by the attention given to the statute by Congress. Section 409 has been amended twice to increase the privilege for highway safety data. A 1991 amendment added protection of the data from pre-trial discovery. Pub. L. No. 102-240, Title I, Part A, § 1035(a), 105 Stat. 1978 (1991). This was an apparent reaction to cases holding that the original 1987 statute prohibited use of the data at trial, but did not prohibit discovery of the data. *See Martinolich v. Southern Pac. Transp. Co.*, 532 So. 2d 435 (La. App. 1988).

Congress made a more significant amendment in 1995. A 1993 Louisiana decision had held that 23 U.S.C. § 409 protected actual "data compilations", but did not protect from discovery the "raw data" which had been collected by highway authorities to support their applications for federal safety funding. *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So. 2d 170 (La. 1993). Congress reacted to this decision by adding the words "or collected" to § 409, which had the effect of making the raw safety data,

such as the accident reports in this lawsuit, nondiscoverable and inadmissible. *Reichert v. Dep't of Transp. & Devel.*, 694 So. 2d 193 (La. 1997); Pub. L. No. 104-59, Title III, § 323, 109 Stat. 591 (1995).

The problem created by the Washington Supreme Court decision is more significant because its holding is based on the 1995 amendment to § 409. The Washington Supreme Court held that the congressional intent to protect accident reports and other "raw data" collected by highway authorities served no "vital federal purpose" and could not "reasonably be characterized as an 'integral part' of the Federal-aid highway system's regulation". *Guillen v. Pierce County*, 31 P.3d 628, 654 (Wash. 2001). This holding is in error. As elucidated in the concurring opinion, which is more in the nature of a dissent on this point, the majority's conclusion ignores the evidentiary use of the "collection" of data undertaken because of the federal program. *Id.* at 656-59. The concurring justices correctly emphasized that it was the collection of this data by state highway authorities that provided the enhanced evidence to establish liability, Thus, the federally required collection of data could be protected by federal law without violating the constitution. *Id.* at 658-59.

The need for this Court to resolve this conflict is bolstered by modern trends in governmental liability. Governmental immunities have been eliminated or constrained in recent decades (W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 131, at 1055-56 (5th ed. 1984), and tort litigation against highway authorities has become commonplace. Thus, the protections afforded by § 409 to the federal-state highway safety program will continue to increase in importance. A definitive decision by the United States Supreme Court on the constitutionality of § 409 is needed.

CONCLUSION

The decision of the Washington State Supreme Court is harmful to state and federal interests in making safety improvements to existing highway facilities. The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED

CHRISTINE O. GREGOIRE
Attorney General

WILLIAM BERGGREN COLLINS*
MICHAEL E. TARDIF
Sr. Assistant Attorneys General

1125 Washington Street SE
P.O. Box 40126
Olympia, WA 98504-0126
(360) 459-6600
**Counsel of Record for Amicus Curiae*

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